80-43

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

TEMPLETON'S SERVICE, INC., ET AL., *Petitioners,*

v.

MOBIL OIL CORPORATION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

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QUESTIONS PRESENTED

1. Is the Temporary Emergency Court of Appeals bound by the Federal Rules of Civil Procedure ("FRCP"), and if so, did not the Court commit clear error by ignoring the purpose and meaning of FRCP 15(b)?

2. Can the Temporary Emergency Court of Appeals invalidate, without justification, a ruling duly promulgated by and within the authority of the Federal Energy Administration ("FEA") and thus completely distort the FEA regulation the ruling was intended to interpret?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	2
JURISDICTION	2
STATUTORY AND REGULATORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE AND HISTORY OF THE LOWER COURT PROCEEDINGS	3
REASONS FOR GRANTING THE WRIT	6
I. The Judgment Of The Temporary Court of Appeals Disregards The Federal Rules of Civil Procedure	7
II. The Temporary Emergency Court of Appeals Improperly Invalidated a Duly Established and Authorized Federal Energy Administration Ruling	11
CONCLUSION	16

TABLE OF AUTHORITIES

CASES. PAGE

Doralee Estates v. *Cities Service Oil Co.*, 569 F.2d 716 (2d Cir. 1977) 10

Duke v. *Sun Oil Co.*, 320 F.2d 853 (5th Cir. 1963)..... 10

Francois v. *Francois*, 599 F.2d 1286 (3d Cir. 1979), *cert. denied*, 100 S.Ct. 679 10

Jurinko v. *Wiegard*, 477 F.2d 1038 (3d Cir.), *vacated and remanded on other grounds*, 414 U.S. 970 (1973) 10

Keeffe Bros. v. *Teamsters Local Union No. 592*, 562 F.2d 298 (4th Cir. 1977) 10

Koen v. *Long*, 302 F.Supp. 1383 (E.D. Mo. 1969), *aff'd*, 428 F.2d 876 (8th Cir.), *cert. denied*, 401 U.S. 923 (1971) 10

Proctor v. *Gissendaner*, 579 F.2d 876 (5th Cir. 1978).... 10

Shell Oil Co. v. *Federal Energy Administration*, 400 F.Supp. 964 (S.D. Tex. 1975), *aff'd.*, 527 F.2d 1243 (TECA 1975) 11, 12, 13

Udall v. *Tallman*, 380 U.S. 1 (1965) 15

Underwriters Salvage Co. v. *Davis and Shaw Furniture Co.*, 198 F.2d 450 (10th Cir. 1952)..... 10

United States v. *Larinoff*, 431 U.S. 864 (1977) 15

STATUTES:

15 U.S.C. § 75, *et seq.* 3

28 U.S.C. § 1254(1) 2

§ 211(g) of the Economic Stabilization Act, as amended, See Note following 12 U.S.C. § 1904 (1979 Supplement) 2

FEDERAL RULES OF CIVIL PROCEDURE:

Rule 15(b)..... 2, 7, 8, 9, 10, 11

Table of Authorities Continued

REGULATIONS AND RULINGS: PAGE

10 C.F.R. § 212.31 ..... 3, 4, 12

10 C.F.R. § 212.83 4

10 C.F.R. § 212.83(f)(I)(i) 4

FEA Ruling 1975-2 ..... 3, 12, 13

MISCELLANEOUS:

Wright and Miller, 6 Federal Practice and Procedure, § 1471 (1971 ed.) 9

Wright and Miller, 6 Federal Practice and Procedure, § 1491 (1971 ed.) 9

3 Moore's Federal Practice, ¶15.13[2] (2d ed. 1975) 9, 10

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TEMPLETON'S SERVICE, INC., ET AL., *Petitioners,*

v.

MOBIL OIL CORPORATION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

Petitioners Templeton's Service, Inc., et al., [1] respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Temporary Emergency Court of Appeals of the United States ("TECA") entered in this proceeding on June 10, 1980.

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[1] Other plaintiffs-petitioners are Leonard Krawczak, t/a Len's Auto Wash; Slayton's Mobil Service Company; and Theodore Zuzak and Stanley Moryc, t/a Ted and Stan's Mobil Service.

OPINIONS BELOW

The memorandum opinion and order of the district court (Appendix A) was entered on August 2, 1977. The opinion of TECA (Appendix B) was rendered on June 10, 1980.

JURISDICTION

This Petition for Certiorari was timely filed within thirty (30) days of the judgment rendered by TECA. The jurisdiction of this Court is invoked under Section 211 (g) of the Economic Stabilization Act, as amended, (see Note following 12 U.S.C. § 1904, 1979 Supplement) and 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Rule 15(b) of the Federal Rules of Civil Procedure:

> (b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a conti-

nuance to enable the objecting party to meet such evidence.

10 C.F.R. §212.31 - Class of Purchaser:

> " 'Class of Purchaser' means purchasers to whom a person has charged a comparable price for comparable property or service pursuant to customary price differentials between those purchasers and other purchasers."

10 C.F.R. §212.31 - Customary Price Differential:

> ". . .a price distinction based on a distinct allowance, add-on, premium, and an extra based on a difference in volume, grade, quality, or location or type of purchaser, or a term or condition of sale or delivery."

FEA Ruling 1975-2—Attached as Appendix C.

STATEMENT OF THE CASE AND HISTORY OF THE LOWER COURT PROCEEDINGS

This case was brought under the Emergency Petroleum Allocation Act of 1973, Public Law 93-159, as amended, 15 U.S.C. §75 *et seq.*, by four owners and operators of gasoline service stations against Mobil Oil Corporation (hereinafter "Mobil") for improperly calculating the "base price" of gasoline sold by Mobil in the Detroit Resale District, which includes the Michigan counties of Wayne, Oakland, and Macomb. Two types of dealers operated Mobil retail outlets in the Detroit District: those who leased service stations from Mobil and had both a lease and supply agreement ("OG&L" dealers) and those who owned their own stations and had only a supply agreement with Mobil ("N" dealers).

FEA regulations prohibited a refiner from charging to "any class of purchaser"[2] a price in excess of the maximum allowable price. 10 C.F.R. §212.83. The base price under this rule was the "weighted average price at which the item was lawfully priced in transactions with the class of purchaser concerned on May 15, 1973. . . ." 10 C.F.R. §212.83(f) (1) (i).

Plaintiffs contended that "N" dealers were a separate class of purchaser, and Mobil's base price to "N" dealers should therefore have been different from the base price charged to "OG&L" dealers.[3] However, Mobil's "base price" to all dealers in the Detroit District—both "OG&L" and "N'— was the same. It was Plaintiffs' contention that Mobil was required by FEA pricing regulations to compute a separate base price for "N" dealers.

Mobil's position was that all Mobil retail service station dealers in the Detroit Resale District, both "N" dealers and "OG&L" dealers, comprised one "class of purchaser" as defined in 10 C.F.R. §212.31.

This case was commenced in April 1975, in the Eastern District of Michigan. In June 1975, Mobil filed a motion to dismiss the Complaint on the ground that Plaintiffs had not exhausted their administrative remedies. That motion was denied by the court in a memorandum and order dated October 16, 1975, and reported at 402 F.Supp. 368 (E.D. Mich. 1975). After discovery, Mobil filed a motion for summary judgment in February, 1977, which was

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[2] 10 C.F.R. §212.31 defines class of purchaser as follows:

" 'Class of purchaser' means purchasers to whom a person has charged a comparable price for comparable property or service pursuant to customary price differentials between those purchasers and other purchasers."

[3] Plaintiffs also contended that there was a further subclassification of "N" dealers, those who had received competitive allowances.

denied by the Court on March 9, 1977. The case subsequently was tried by the Court wihtout a jury in March 1977.

During the course of the trial, evidence was presented describing the two general types of retail gasoline purchasers within the Detroit District. Both parties defined those two basic types as being the "N" and "OG&L" dealers. Neither party disputed the fact that no allowances of any kind were available to "OG&L" dealers. On the other hand, as a matter of Mobil policy, allowances based on a cents per gallon formula up to 2.5 cents per gallon, and other concessions, were given by Mobil to "N" dealers at locations where Mobil desired to have a Mobil station. Of the one hundred twenty Mobil "N" dealers in the Detroit Resale District, sixty were receiving an allowance on gasoline purchased from Mobil as of May 15, 1975. Plaintiffs were among the sixty Detroit District "N" dealers who received an allowance.

On August 2, 1977, the district court issued a memorandum opinion and order in which it found, based on a consideration of the evidence presented at trial, that there were two classes of purchasers under the appropriate FEA regulation—"N" dealers and "OG&L" dealers. These findings were based upon the undisputed facts that:

1. Mobil's allowance and concession program was available only to "N" dealers. Finding of Fact, 21—Appendix A at p.7

2. Mobil had no expenses relating to the upkeep, ownership or leasing of property on which the stations of the Plaintiffs and other "N" dealers were located. Finding of Fact 22—Appendix A at p.8

3. Mobil realized cost savings and advantages in doing business with "N" dealers, which cost savings and advantages were not realized when doing business with "OG&L" dealers. Finding of Fact, 31—Appendix A at p.10.

4. The economics of the sales by Mobil to its "N" dealers on the one hand and the sales to its "OG&L" dealers on the other were quite different and distinct. Appendix A at p.14.

In November 1977, Mobil filed a motion to amend or alter the opinion, which was denied by the Court on June 21, 1978. Subsequently, the Court received additional briefing relating to the question of damages, and finally on March 14, 1979, entered final judgment in the amount of $138,584.51 in favor of the Plaintiffs. Mobil then appealed.

On appeal, TECA held that the district court had exceeded its authority by allegedly deciding a claim that was never presented to it and that allegedly was neither pleaded nor tried. The Court further held that all Mobil retail service station dealers in the Detroit Resale District, both "N" dealers and "OG&L" dealers, comprised one class. (Appendix B at pp. 6,8).

REASONS FOR GRANTING THE WRIT

The Temporary Emergency Court of Appeals was created by Section 211(b) (1) of The Economic Stabilization Act, as amended in 1971. Because of Congress' desire to ensure a uniform and nationwide implementation of this statute, the authority of the Temporary Emergency Court of Appeals, unlike most courts of appeal, is extremely broad and is national in scope.

The issues in this case and the ruling of the Temporary Emergency Court of Appeals on the merits affect

not only the parties in this case but thousands of other service stations and a number of major petroleum companies, whose miscalculations of base prices resulted in losses of millions of dollars to the affected dealers.

I. The Judgment of the Temporary Emergency Court of Appeals Disregards the Federal Rules of Civil Procedure.

TECA reversed the judgment of the district court on the grounds that the district court had allegedly exceeded its authority in deciding an issue never raised by the pleadings nor tried by the express or implied consent of the parties. This ruling is in error and disregards the application of Rule 15(b) of the Federal Rules of Civil Procedure.[4]

Rule 15(b) of the Federal Rules of Civil Procedure provides in pertinent part as follows:

> "b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. . . ."

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[4] TECA never referred to the district court's right under FRCP 15(b) to conform the pleadings to the evidence presented at trial. TECA's failure to do so is even more remiss since Mobil raised this precise issue in its Motion to Alter the Memorandum Opinion and Order of August 2, 1977, and in response Plaintiffs pointed out the appropriateness of the district court's judgment under FRCP 15(b). The district court denied Mobil's motion without further explanation of this issue on June 21, 1978.

The application of Rule 15(b) to the facts of this case is premised on the supposition that the pleadings did not raise the issue as to whether or not "N" dealers were a class of purchasers separate from "OG&L" dealers. However, both the plaintiffs' and defendants' trial briefs addressed the fact that Mobil classified its retail dealers into two categories—"OG&L" and "N" dealers. Plaintiffs contended that "N" dealers were different types of purchasers within the meaning of the applicable FEA regulations, and, therefore, were a separate class from "OG&L" dealers. As stated in Plaintiffs' Trial Brief at p.6:

> "The difference between these types of purchasers is critical. 'OG&L' dealers lease their stations from Mobil; 'N' dealers own them. As a result, their treatment by Mobil is totally different and results in two distinct and differentiated types of purchasers.
>
> 'N' dealers, therefore, fall within the 'type of purchaser' criteria set forth in the appropriate FEA Regulation (10 C.F.R. 212.31)."

Within the class of "N" dealers Plaintiffs claimed there was a subclass of "N" dealers who received a competitive allowance. In responding to these allegations, Defendant presented evidence as to the distinction between "N" and "OG&L" dealers and argued that all "OG&L" and "N" dealers were a single class of purchasers. Trial Brief of Defendant Mobil Oil Corp., p. 2.

Both parties and the evidence directly addressed the identifying characteristics of "N" and "OG&L" dealers generally. The issue before the district court was to determine what were the classes of purchasers of Mobil gasoline in the Detroit District. Both parties based their trial memoranda and presented evidence to the Court on this question. Neither party objected to the introduction of evidence identifying "N" dealers generally and the

characteristics which made "N" dealers eligible for the granting of allowances which were not extended to "OG&L" dealers.

At a minimum, Defendant having failed to object when such evidence was introduced, the issue as to whether "N" dealers were an appropriate class of purchasers was tried with the express and implied consent of the Defendant. It was clear error for TECA to reverse the judgment of the District Court and to withdraw that court's determination to conform the pleadings to the evidence under Rule 15(b) where there was no clear abuse of discretion in the District Court's exercise of its judgment.

TECA's ruling is a reversion to the common law rules of strict pleading requirements, which were expressly replaced by the Federal Rules of Civil Procedure.

The purpose of Rule 15(b) is to provide the maximum opportunity for each claim to be decided on its merits rather than on procedural technicalities. See 6 *Wright and Miller, Federal Practice and Procedure,* § 1471 (1971 ed.) Rule 15(b) is designed to adjust the pleadings to reflect the actual case litigated in the courtroom. At common law, evidence offered at trial which was at variance with the allegations in the pleadings generally could not be admitted, or even if admitted was not allowed to provide the basis for a final disposition of the action. Rule 15(b) was designed to eliminate the harshness of this earlier practice and to promote judgments on the merits. See 6 *Wright and Miller, Federal Practice and Procedure,* § 1491 (1971 ed.).

If the issues in a litigation are tried with the express or implied consent of the parties, they are to be treated in all respects as if raised in the pleadings, even if they are not so formally pleaded. See 3 *Moore's Federal Practice,*

¶15.13[2] (2d ed. 1975) and cases cited therein. The fact that there was no formal amendment to the pleadings is of no consequence. *Proctor* v. *Gissendaner*, 579 F.2d 876, 885, n. 20 (5th Cir. 1978). The appropriate test is whether a defendant has had a fair opportunity to defend the issues raised by the plaintiff if they are not specifically pleaded in the Complaint. Here, there is no question that Mobil had a fair opportunity to present and did, in fact, present evidence demonstrating its belief that there was only a single class of purchasers, consisting of all Mobil retail service station dealers in the Detroit Resale District.

In similar circumstances, district courts have been given wide latitude in conforming the pleadings to the evidence. See *Francois* v. *Francois*, 599 F.2d 1286, 1294, n. 6 (3d Cir. 1979), *cert. denied*, 100 S. Ct. 679; *Doralee Estates* v. *Cities Service Oil Co.*, 569 F.2d 716, 724 (2d Cir. 1977); *Keeffe Bros.* v. *Teamsters Local Union No. 592*, 562 F.2d 298 (4th Cir. 1977); *Jurinko* v. *Wiegand Co.*, 477 F.2d 1038 (3d Cir.) *vacated and remanded on other grounds*, 414 U.S. 970 (1973); *Duke* v. *Sun Oil Co.*, 320 F.2d 853 (5th Cir. 1963); *Underwriters Salvage Co. of New York* v. *Davis and Shaw Furniture Co.*, 198 F.2d 450, 453 (10th Cir. 1952) *Koen* v. *Long*, 302 F. Supp. 1383, 1389 (E.D. Mo. 1969), *aff'd* 428 F.2d 876 (8th Cir.) *cert. denied*, 401 U.S. 923 (1971).[5]

The precise issue before the district court was the identification of the appropriate class of purchasers under

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[5] For example, in *Jurinko* v. *Wiegard Co.*, plaintiffs specifically alleged that they were discriminated against because they were "married women." The Court rejected this contention but found sufficient evidence to support a judgment in their favor on the more generalized theory that the discrimination existed with respect to their status as "women," not just "married women." The Court recognized that such a precise claim had not been made but it was well within its authority under Rule 15(b) to conform the pleadings to the evidence presented. Similar reasoning is applicable here. There is no dispute as to the facts presented but rather only as to the inferences and legal conclusions to be drawn therefrom.

the governing FEA regulations. All of the evidence introduced related to defining the class of purchasers. Defendant was not prejudiced by the Court's judgment since it presented all of the evidence it desired to try to establish that there was only one single class of purchaser and that there was no class of "N" dealers.

The district court's judgment was justified under FRCP 15(b).

II. The Temporary Emergency Court of Appeals Improperly Invalidated a Duly Established and Authorized Federal Energy Administration Ruling

In reaching its judgment, reversing the decision of the district court, TECA improperly invalidated an FEA ruling in reliance on its prior decision in *Shell Oil Co.*v. *Federal Energy Administration*, 400 F.Supp. 964 (S.D. Tex 1975), *aff'd.* 527 F.2d 1243 (TECA 1975), which held that there was no relationship between service station rents and gasoline prices. TECA held that "N" and "OG&L" dealers were one class of purchaser, and further found that an explicit FEA ruling to the contrary was invalid. Appendix B at pp.6-8. This holding is seriously in error.

As noted in the concurring opinion of Judge Larson, there is no relationship between TECA's decision in *Shell* v. *FEA* and the issue decided by the district court, *i.e.*,the appropriate class of purchaser.

In *Shell* v. *FEA,* TECA held that the FEA did not have authority to control rents charged for service station

property. No such issue is directly, indirectly, peripherally or tangentially involved in this case.[6]

The issue before the district court was whether Mobil had properly calculated the base price for an appropriate class of purchasers in the Detroit Resale District. The FEA regulation in question concerned the definitional characteristics of a class of purchasers.

"Class of purchasers" is defined as:

> ". . . purchasers to whom a person has charged a comparable price for comparable property or service pursuant to customary price differentials between those purchasers and other purchasers." 10 C.F.R. §212.31.

"Customary price differential" is in turn defined to include:

> ". . . a price distinction based on a distinct, allowance, add-on, premium, and an extra based on a difference in volume, grade, quality, or location or type of purchase, or a term or condition of sale or delivery." 10 C.F.R. §212.31.

Pursuant to this regulation, the FEA enacted Ruling 1975-2 as a guideline "with respect to the meaning of the terms 'class of purchaser' and 'customary price differential . . . .' " Ruling 1975-2, 3 *Federal Energy Guidelines,* ¶16,042 at p. 16,580.

After outlining the general principles, the FEA provided "illustrative examples" as to their application. Example No. 6 to FEA Ruling 1975-2 was found by the district court to be controlling. Indeed, a majority of the TECA apparently agreed that Ruling 1975-2 was controlling but claimed it to be invalid in light of the decision in *Shell* v. *FEA. (Appendix B at p.8)*

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[6] In fact, the district court specifically recognized that there was no relationship between rents and prices in this case. Finding of Fact, 30 - Appendix A at pp. 9-10.

Ruling *1975-2* and *Shell* v. *FEA* have no relation to each other.

As explained by Judge Larson,

> ". . . Ruling 1975-2 does not represent an attempt to control rents, but rather represents an attempt to define who constitute the appropriate classes of purchaser under the energy regulations."
>
> (Appendix B, J. Larson's concurring opinion at p.1).

The import of the "class of purchasers" distinction and Ruling 1975-2 is not to allow the FEA to regulate the rents charged to lessee dealers but to "require in some circumstances that those dealers who rent from the supplier be treated as a separate class of purchaser."

As contained in Example No. 6:

> ". . . A significant distinction between . . .purchasers on the basis of volume, location, type of purchaser, etc., is sufficient to require that they be placed in separate classes of purchaser, nowithstanding that the seller gave them the same price on May 15, 1973. Thus, Firm F is required to place its dealers that lease their stations in a separate class of purchaser from those that do not." Ruling 1975-2, *Federal Energy Guidelines, supra,* at p. 16,592.

The purpose of the controlling regulations is to maintain customary differences between classes of retail gasoline purchasers, not to fix retail gasoline prices in relation to leased station rents. "A principal function of the class of purchaser concept . . . [was] to preserve the price distinctions among purchasers that customarily existed under free market conditions." (Appendix B, J. Larson's concurring opinion at p.2)

The decision in *Shell* v. *FEA* is wholly inapposite to this case.

Had the Court not unlawfully invalidated Ruling 1975-2, the record evidence unequivocally establishes the existence of two separate classes of purchasers. TECA never analyzed whether, in the absence of the *Shell* ruling, the district court properly found that two separate classes of purchasers exised in the Detroit Resale District.

The district court found that all gasoline sold from Mobil's Dearborn Terminal was sold either to "N" dealers (those who own their stations or lease them form someone other than Mobil) or to "OG&L" dealers (those who lease their stations directly from Mobil).

The Court further found that:

(1) "The Detroit Resale District is one of Mobil's most competitive marketing areas in the United States. As of May 15, 1973, of the 120 Mobil "N" dealers in the Detroit Resale District, 60 were receiving an allowance on gasoline purchased from Mobil. (Finding of Fact, 8-Appendix A at p.4)

(2) "At no time did any of Mobil's lessee-dealers [those who do not own their stations; also called 'OG&L' dealers] in the Detroit Resale District or elsewhere receive allowances such as those at issue herein on gasoline purchased from Mobil." (Finding of Fact, 13 - Appendix A at p.6)

(3) "The allowances paid to plaintiffs and other "N" dealers receiving such allowances in the Detroit Resale District was in practice deducted from the common Dealer Tankwagon Price on their individual invoices." (Findings of Fact, 19 - Appendix A at p.7)

(4) "Mobil's allowance and concession program was available only to 'N' dealers." (Finding of Fact, 21 - Appendix at p.7)

(5) "Mobil only granted competitive discounts to 'N' stations which were not competing with other Mobil stations." (Finding of Fact, 27 - Appendix A at p.9)

Mobil itself treated "N" and "OG&L" dealers differently for the very reasons specified in the FEA Regulations. The vital difference between those two types of purchasers was that "N"dealers owned their own stations, while "OG&L" dealers leased their stations. The station locations and the cost savings realized by Mobil in selling to "N" dealers as opposed to "OG&L" dealers were also differentiating factors under the applicable regulations.

Similarly, the Court found there was no dispute in the evidence as to the fact that the economics of sales by Mobil to its "N" and "OG&L" dealers "were quite different and distinct."(Appendix A at p. 14).

Under the literal terms of the regulations Mobil was, therefore, required to establish a separate class of purchasers for "N" and "OG&L" dealers.

Further, Ruling 1975-2 specifically explains that a supplier must create separate classes for those dealers who leased their stations from that supplier and those dealers who owned their own stations or leased their properties from someone other than the supplier. The plain language of the rulings and the regulations cannot be contradicted.

It is a basic proposition that an agency's interpretation of its regulations shall be of controlling weight unless plainly erroneous or inconsistent with the regulation. *See United States* v. *Larinoff*, 431 U.S. 864, 872 (1977); *Udall* v. *Tallman*, 380 U.S. 1 (1965). The decision of TECA in this matter was in derogation of this rule. TECA failed to examine the facts in the record which established a clear distinction betwen Mobil's "N" and "OG&L" dealers. TECA had no authority to disregard the FEA regulations or to invalidate the pertinent FEA ruling.

Conclusion

For the reasons set forth herein, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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Appendices

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 5-70709

TEMPLETON'S SERVICE, INC., ET AL., *Plaintiffs,*

v.

MOBIL OIL CORPORATION,
a New Jersey Corporation, *Defendant.*

MEMORANDUM OPINION AND ORDER

Under the authority of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751-56, the Federal Energy Administration ["FEA"] promulgated certain regulations with the purpose of regulating the pricing of petroleum products being sold by the oil companies to its customers. This is a suit for monetary damages brought by four of one hundred twenty Detroit area owner-dealers of Mobil Stations [hereinafter referred to as "N" dealers] alleging that the Mobil Oil Corporation ["Mobil"] violated certain of these regulations by discontinuing certain "competitive discounts" on purchases by these "N" dealers that had been in effect on May 15, 1973 under retail dealer contracts.

It is the claim of the plaintiffs that in the Detroit Reseale District, "N" dealers who were receiving "competitive discounts" as of May 15, 1973 constitute a "class of purchaser" as defined by FEA regulations and that these "competitive discounts" given to the members of this class constituted a "customary price differential" as used in those regulations. Plaintiffs contend that the failure of Mobil to continue this "customary price differential" to this "class of purchaser" violated a regulation of the FEA requiring that such price differentials be maintained.

Mobil contends that all of its "N" dealers in the Detroit Resale District, along with its lessee-dealers [those stations

owned by Mobil and leased to dealers, hereinafter referred to as "OG&L" stations] constitute a single "class of purchaser" under the appropriate FEA regulations and that, the "competitive discounts" given to certain "N" dealers were not "customary price differentials" under the regulations. Therefore, Mobil asserts, it has not violated any FEA regulation by failing to treat "N" dealers who had been receiving a "competitive discount" as of May 15, 1973 as a separate "class of purchaser."

FINDINGS OF FACT

1. Plaintiff Templeton's Service, Inc. [hereinafter "Templeton"], a Michigan corporation doing business at 11175 Chalmers and Glenfield, Detroit, Michigan, is the owner of a service station reselling certain products including gasoline purchased from defendant Mobil Oil Corporation [hereinafter "Mobil"].

2. Plaintiff Leonard R. Krawczak, doing business as Len's Auto Wash [hereinafter "Krawczak"], 1475 Middlebelt, Inkster, Michigan, is the owner of a service station reselling certain products including gasoline purchased from Mobil.

3. Plaintiffs Theodore Zuzak and Stanley Moryc, doing business as Ted and Stan's Mobil Service [hereinafter "Zuzak"],19650 Joy Road, Detroit, Michigan, are owners of a service station reselling certain products including gasoline purchased from Mobil.

4. Plaintiff Slayton's Mobil Service Co., which name has been subsequently changed to Slayton's Service Co. [hereinafter "Slayton"], a Michigan corporation doing business at 750 N. Telegraph, Detroit, Michigan, is the owner of a service station reselling certain products including gasoline purchased from Mobil.

5. Defendant Mobil is a New York corporation with its principal place of business in the State of New York and is in the business of, *inter alia*, marketing petroleum products.

6. Plaintiffs' service stations each are located within the Detroit Resale District, which is a geographical distribution area established by Mobil and consisting mainly of Wayne, Oakland and Macomb Counties, State of Michigan.

7. All gasoline purchased by plaintiffs was delivered from Mobil's Dearborn Terminal located at 6011 Wyoming, Dearborn, Michigan. Similarly, all gasoline purchased by the remaining Mobil owner-dealers [those who owned their stations or who leased them from someone other than Mobil; also called "N" dealers] and by Mobil lessee-dealers [those who leased their stations from Mobil; also called "OG&L" dealers] in the Detroit Resale District was delivered from the Dearborn Terminal with the exception of twelve stations which received their gasoline from the Lansing, Michigan Terminal.

8. The Detroit Resale District is one of Mobil's most competitive marketing areas in the United States. As of May 15, 1973, of the 120 Mobil "N" dealers in the Detroit Resale District, 60 were receiving an allowance on gasoline purchased from Mobil.

9. Mobil paid Templeton's an allowance of 1 cent per gallon of gasoline purchased from Mobil continuously from October 1966 until September 30, 1973, a period of approximately seven years, on which date Mobil withdrew its allowance.

10. Mobil paid Krawczak an allowance of 1.3 cents per gallon on all gasoline purchased from Mobil continuously from approximately August 1970 until July 31, 1973, a period of approximately three years, on which date Mobil withdrew its allowance.

11. Mobil paid to Slayton's Service Co. an allowance of .5 cents per gallon on all gasoline purchased from Mobil continuously from 1952 to May 1969. Subsequent to May 19, 1969, Mobil paid to Slayton an allowance of 1.5 cents per gallon on all gasoline purchased from Mobil continuously

from approximately 1969 to July 31, 1973, said allowance being paid for approximately twenty-one years, on which date Mobil withdrew its allowance.

12. Mobil paid to Zuzak an allowance of 1.25 cents per gallon on all gasoline purchased from Mobil continuously from approximately July 1969 to July 30, 1973, a period of approximately four years, at which time said allowance was withdrawn by Mobil.

13. At no time did any of Mobil's lessee-dealers [those who do not own their stations' also call "OG&L" dealers] in the Detroit Resale District or elsewhere receive allowances such as those at issue herein on gasoline purchased from Mobil.

14. As a matter of policy, Mobil granted allowances to "N"dealers only when competitive conditions in the marketplace justified such allowances, when Mobil could not retain or acquire such customers without granting allowances, and when Mobil was presented with an affidavit or letter from the particular "N"dealer that could be relied on in good faith as establishing that the dealer had received an offer from one of Mobil's competitors.

15. As a matter of policy, competitive allowances were and are periodically reviewed by Mobil to determine whether the competitive conditions which gave rise to such allowances continued to exist. Moreover, one function of Mobil marketing representatives was and is to be familiar with competitive market conditions, as regards the sale of gasoline by suppliers other than Mobil, in their particular area of responsibility.

16. Throughout the history of the various phases of price control regulations under the Cost of Living Council and the FEO-FEA, Mobil has consistently classified its gasoline purchasers into three categories - retail service station dealers, which includes all "OG&L" and "N' dealers; wholesale distributors; and commercial (consumer) accounts.

17. All Mobil retail service station dealers in the Detroit Resale District, both "N" and "OG&L" dealers, were charged for gasoline at the posted dealer tankwagon price ["DTW"] at the Dearborn Terminal, except that allowances in varying amounts were given off the DTW Price to certain "N" dealers, such as plaintiffs, who received offers from Mobil's competitors that Mobil met in good faith in order to acquire or maintain the particular "N" dealer account.

18. Mobil sold its gas to all its dealers in the Detroit Resale District - whether "N" or "OG&L" dealers - at the same Dealer Tankwagon (wholesale) Price during all periods relevant to this lawsuit.

19. The allowances paid to plaintiffs and other "N" dealers receiving such allowances in the Detroit Resale District was in practice deducted from the common Dealer Tankwagon Price on their individual invoices.

20. For the purposes of determining whether allowances should be given, Mobil treated the Detroit Resale District as a separate and distinct entity.

21. Mobil's allowance and concession program was available only to "N" dealers.

22. Mobil has no expenses relating to the upkeep, ownership or leasing of property on which the stations of plaintiffs and other "N" dealers are located.

23. Mobil's fundamental approach and policy with respect to the acquisition and maintaining of "N" dealer accounts was to sell gasoline to such dealers at the DTW price without any allowances whatsoever.

24. Mobil's interest in acquiring or maintaining "N" dealer accounts at any particular point in time is attributable to the fact that at that given time Mobil had more gasoline to sell than could be sold to its "OG&L" dealers.

25. Mobil's rationale for granting allowances to "N" dealers was not that Mobil would not have the underlying ex-

penses of acquisition or ownership or maintenance of the service station property; rather, Mobil's sole intent and purpose in granting allowances to certain "N" dealers was to meet offers made to those "N"dealers by competitors of Mobil.

26. It was Mobil's policy and practice to seek and require competitive letters only prior to entering into a Supply Agreement with plaintiffs.

27. Mobil only granted competitive discounts to "N" stations which were not competing with other Mobil stations.

28. Mobil did not withdraw its allowances to all "N" dealers subsequent to May 15, 1973, but continued them to some accounts, changing their designations from "competitive allowances" to "government mandated discounts."

29. Mobil's basic objective in determining service station rents to be charged its "OG&L" dealers is to collect as rent between 15 to 20 percent of a dealer's gross profit on the operation of the entire business. Mobil does not attempt to achieve any necessary corelation between the rent it charges its "OG&L" dealers and the amount of real property investment by Mobil in acquiring the service station premises, because, in many instances, competition in the marketplace would not permit Mobil to charge rents on that basis.

30. Mobil charges rents to its "OG&L" dealers for use of the service station premises pursuant to a written Service Station Lease; gasoline is supplied to and paid for by "OG&L" dealers pursuant to a separate Retail Dealer Contract. There is no relationship between the rentals which Mobil charges it "OG&L" dealers pursuant to a separate Retail Dealer Contrct. There is no relationship between the rentals which Mobil charges it "OG&L" dealers and the price of gasoline which Mobil charges to all its retail service station dealers alike, "OG&L" and "N"; i.e., the DTW price.

31. Mobil realized cost savings and advantages from doing business with "N" dealers, which cost savings and advantages were not realized when doing business with "OG&L" dealers.

32. Competitive market conditions in the retail service station business in the Detroit Resale District changed dramatically in the sumer and fall of 1973, as they did throughout the United States, in that there was a shortage of gasoline due to the Arab oil embargo, which led to petroleum allocation regulation by the federal government.

33. The weighed average for all "N" dealers receiving allowance as of May 15, 1973 was 1.05 cents.

Discussion of the Law.

The FEA has provided in 10 C.F.R. §212.82 for the maintenance of certain prices by oil companies to their buyers. The regulation provides:

> "(a) *Rule.* A refiner may not charge to any class of purchaser a price for a covered product in excess of the base price of that covered product except [for certain increases] . . . "
>
> "(b) *Base Price.* (1) *Definition.* The base price for sales of an item by a refiner is the weighted average price at which the item was lawfully priced in transactions with the class of purchaser concerned on May 15, 1973, plus increased product costs incurred between the month of measurement and the month of May 1973 . . . In computing the base price, a firm may not exclude any temporary special sale, deal or allowance in effect on May 15, 1973."

10 C.F.R. §212.31 defines "class of purchaser" as follows:

> "Class of purchaser" means purchasers to whom a person has charged a comparable price for comparable property or service pursuant to customary price differentials between those purchasers and other purchasers."

and "customary price differential" is defined by the same section as:

> "Customary price differential" includes a price distinction based on a discount, allowance, add-on, premium,

> and an extra based on a difference in volume, grade, quality, or location or type of purchaser, or a term or condition of sale or delivery."

The purpose and intent of the FEA in drafting these regulations and in adopting the "class of purchaser" concept was expressed in FEA Ruling 1975-2:

> " . . . a principal function of the class of purchaser concept is to preserve the price distinctions among purchasers that customarily existed under free market conditions. To achieve the objective of making covered products available at equitable prices, FEA regulations require sellers to group together customers that are similarly situated and to compute a weighted average of their May 15, 1973 selling prices in sales to those customers."

The May 15, 1973 date was chosen as a date on which the pre-embargo competitive situation in the gas market was relatively stable. See FEA Ruling 1977-5.

To comply with the regulations, oil companies must, where appropriate, recognize different classes of purchasers which were subject to price distinctions under the free market conditions that existed in May of 1973.

The analysis of what constitutes a separate "class of purchasers" is not a simple thing. It involves more than just looking at the different prices being charged to different customers. It is, in fact, not essential to find that different prices were charged to different groups of purchasers in order to find that they must properly be classified as separate "classes of purchasers" under the regulations.

FEA Ruling 1975-2 attempts to explain the process and the steps to be taken by oil companies in defining their various "classes of purchasers". Since the definition of "class of purchasers" is based on a finding of a "customary price

differential", 10 C.F.R. §212.31, the following explanation of that concept is given in the FEA ruling:

> "The principal significance of the first portion of this definition, which refers to 'a discount, allowance, add-on, premium, and an extra' is to indicate that a 'price distinction' may exist not only because of different selling prices for a product, but may, in fact, exist even though selling prices are equal. Thus, although two purchasers may have purchased the same product at the same price on May 15, 1973, one price may have reflected a particular type of 'allowance' whereas the other price may not have, so that the two purchasers could not appropriately be placed in the same class of purchaser."

The evidence in this case shows that there was no *price difference* between the price Mobil charged to "N" dealers and that charged to "OG&L" dealers. All retail dealers were charged the Dealer Tankwagon Price ["DTW Price"]. Certain of the "N" dealers were then given a discount off the DTW Price as a result of competition with other oil companies. Nevertheless, as the ruling points out, the fact that there was not a *price difference* generally between "N" dealers and "OG&L" dealers as of May 15, 1973 does not mean that the two groups were not being charged prices based on a "*customary price differential*". The evidence in this case shows conclusively that the economics of sales between Mobil and its "N" dealers on the one hand and "OG&L" dealers on the other were quite different and distinct.

The distinction between "N" dealers and "OG&L" dealers is a well-defined difference in "type of purchaser". FEA Ruling 1975-2 notes that the types of distinctions that it discusses (*e.g.* between retailers and wholesalers, branded and non-branded) are not exhaustive of the classes of purchasers that a seller might deal with.

In the area of sales to "N" and "OG&L" dealers then, Mobil was dealing, and should have recognized, two "classes

of purchasers" as defined by 10 C.F.R. §212.31. All "N" dealers comprise one class and all "OG&L" dealers comprise the second class. See Illustrative Example Number 6 in FEA Ruling 1975-2.

The plaintiffs have argued that they are properly part of an even smaller "class of purchasers" than the class of all "N" dealers. The class in which plaintiffs claim membership is that of all "N" dealers who were receiving competitive discounts as of May 15, 1973. The evidence shows that Mobil gave certain of its "N" dealers discounts on the price of gasoline sold. These discounts were given only after it became clear to Mobil that other oil companies had made bona fide competitive offers to these owner-operated stations in an attempt to get them to switch the brand of gasoline they sold. Plaintiffs assert that these discounts, given only to selected "N" dealers, were actually cost justified discounts and that these discounts fall within the definition of "customary price differentials" under the regulations and provide the basis for finding that the "N" dealers who received them were a separate and distinct "class of purchasers".

The court, however, finds no evidence to support the argument that the discounts given to this smaller number of "N" dealers (the evidence shows that 60 of the 120 "N" dealers in the Detroit Resale Area received such discounts) were based on anything other than the necessity of meeting bona fide competition from other oil companies wanting to have these stations sell their own brand of gasoline.

The discounts on which plaintiffs would predicate a separate "class of purchasers" smaller than all "N" dealers are, in fact, true "meeting competition" discounts. A separate "class of purchasers" based on such discounts is not required under the FEA regulations, FEA Ruling 1975-2. In this ruling, the potential for problems involving violations of the Robinson-Patman Act, 15 U.S.C. §13 is noted and the FEA indicated that its requirements for oil companies is to be construed as consistent with the requirements of that act. It

takes note of the fact that if a price differential given to certain customers is for the purpose of meeting competitors' offers, then it is not required to be continued under the regulations of the FEA. The ruling states:

> "If, however, a price differential can be justified only as a competitive discount under section 2(b) (i.e. made in good faith to meet an actual lower bona fide offer or to offset a price war subsidy of a competitor), FEA will not require that a separate class of purchaser be established to reflect that differential. This is so because such dramatic changes in the pricing and competitive structure of the petroleum industry took place during the summer and fall of 1973 that it is unlikely, at least in the absence of FEA price controls, that a supplier could, at any time after September 1, 1973 justify in a Robinson-Patman Act suit a competitive discount if it existed exclusively on the basis that it was necessary to meet a lower offer made by a competitor on or before May 15, 1973."

The plaintiffs have presented a strong argument that such a conclusion is inapplicable to the situation in this case and have attempted to show that Mobil would not have been faced with any potential Robinson-Patman jeopardy had they continued to pay competitive discounts to the plaintiffs.[1]

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[1] Plaintiffs' basic argument is that Robinson-Patman liability only becomes a possibility if the price discrimination that is being made would " . . . substantially lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefits of such discrimination, or with customers of either of them***" 15 U.S.C. 13(a). Such effects have been referred to as "primary injury" — injury to competition with the competitors of the seller, "secondary" injury — injury to competition — between purchasers of the goods, and "tertiary" injury, injury to competition — between customers of the purchasers. There is no question in this case of any possible tertiary injury since the customers of the purchasers are individual consumer-motorists. Plaintiffs spent a considerable amount of time at trial establishing that when Mobil gives such competitive discounts it first ascertains

While the court might be convinced by plaintiffs' presentation that the FEA's concern for possible violations of the Robinson-Patman Act are unfounded or unsupported by an accurate reading of the law, this overlooks the fact that the FEA, pursuant to its authority, has chosen to act on its interpretation of the Robinson-Patman Act and allow oil companies to discontinue competitive discounts to its purchasers. See Illustrative Example Number 6 in FEA Ruling 1975-2. Businesses being regulated by federal agencies should be entitled to rely on the pronouncements of those agencies. This is important regardless of the fact that the agency may have based its pronouncements on a reading of the law which does not coincide with the reading given to it by a court at a later time. While the FEA's conclusions on the effect of the Robinson-Patman Act may be subject to debate, the operative language of the rulings of the FEA and the relevant portion is that which tells the regulated companies how they may or may not act. In Ruling 1975-2, the FEA has indicated that oil companies do not have to create a separate class of purchaser for those who were receiving competitive discounts on May 15, 1973. FEA has the statutory authority to make this ruling and this court will not attack its reasons for so doing.

The court has found that there are two required classes under the FEA regulations: all "N" dealers and all "OG&L" dealers. As members of the class of "N" dealers, plaintiffs would have to show, in order to prove damages, that Mobil did not compute the weighted average price for their class correctly. Under the provisions of FEA Ruling 1977-5, the

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that such a pricing discrimination will not hurt competing Mobil dealers. The court finds that the plaintiff has established this, therefore showing that there is no secondary injury. Plaintiffs, in a post-trial brief have argued that there is no primary injury either. While this court might be included to engage in an extended analysis of Robinson-Patman law, to determine the accuracy of the FEA's Robinson-Patman fears, as expressed in 1975-2, this would not change the effect of a properly promulgated FEA policy, and this court's obligation to follow it.

proper way to compute the weighted average base price for any "class of purchaser" is to look to the transactions that took place between the oil company and the members of that class on May 15, 1973. Thus, if there was one sale to a member of the class of "N" dealers on May 15, 1973 and that particular "N" dealer was receiving a discount, that price would be the proper price for the entire class. If the "N" dealer was not receiving a discount on that date, then the price that the "N" dealer paid on that date would still be the proper price for the class of "N" dealers for future pricing under the regulations. Mobil has admitted that it has been proceeding on the basis of a single class consisting of both its "N" dealers and its "OG&L" dealers. In determining the base price to charge to this class, Mobil has followed the procedure of 1977-5 and took the price charged in a contract dated May 15, 1973 with a Mr. Jack Ferguson. It is apparent that if Mr. Ferguson is an "N" dealer, there has been no damage to the plaintiffs resulting from Mobil's use of a single class rather than the two classes found by the court to be required under the FEA regulations. This is so because the price charged to Mr. Ferguson would have been the proper base price for all "N" dealers. It is possible that Mr. Ferguson was an "OG&L" dealer. If that is the case, then Mobil should not have used the price charged to him to detemine the base price for its "N" dealers but should have proceeded in accordance with 1977-5 to find the appropriate transactions to use for its base prices for "N" dealers. It is also possible that such a search would have properly resulted in a base price for "N" dealers having been established on the basis of a sale to an "N" dealer with a competitive discount. However, this is all speculation. The court does not have the evidence before it to find that the plaintiffs have been damaged by Mobil's failure to treat its "N" dealers and its "OG&L" dealers as separate classes.

The court will schedule a further evidentiary hearing to determine the facts concerning the status of Mr. Ferguson. If the evidence establishes that Mr. Ferguson was an "N"

dealer, the plaintiffs will have no basis for recovery. If, however, Mr. Ferguson was an "OG&L" dealer, the court will take further evidence necessary to determine what the proper base price for "N" dealers should have been.

So ordered.

/s/ CHARLES W. JOINER
Charles W. Joiner
United States District Judge

Dated: August 2, 1977
Detroit, Michigan

Temporary Emergency Court of Appeals of the United States

No. 6-23

TEMPLETON'S SERVICE, INC., *et al.*,
PLAINTIFFS-APPELLEES,

v.

MOBIL OIL CORPORATION,
DEFENDANT-APPELLANT.

Appeal from the United States District Court
For the Eastern District of Michigan, Southern Division
No. 5-70709

(Argued January 15, 1980 Decided June 10, 1980)

DONALD B. MILLER, Butzel, Long, Gust, Klein & Van Zile, Detroit, Michigan, with whom Francis A. Rowen, Jr., Mobil Oil Corporation, New York, New York was on the brief for the Defendant-Appellant.

JERRY S. COHEN, Kohn, Milstein & Cohen, Washington, D.C., with whom Michael D. Hausfeld of the same firm, was on the brief for Plaintiffs-Appellees.

Before GRANT, LARSON, and PECK, Judges.

GRANT, Judge.

Plaintiffs are four Mobil Oil Corporation (Mobil) "N" [1] dealers who resell gasoline products purchased from Mobil. They alleged that Mobil violated Federal Energy Administration (FEA) regulations by withdrawing certain allowances that were being paid to plaintiffs per gallon

[1] Mobil's term for service station dealers who own their stations or who lease them from someone other than Mobil.

of gasoline on May 15, 1973. It is the contention of plaintiffs that they and other Mobil N dealers receiving such allowances comprised a "class of purchaser" distinct from other Mobil N dealers not receiving such allowances and also distinct from Mobil "OG&L" dealers [2] in the Detroit metropolitan area. Plaintiffs further contended that their allowances were "customary price differentials" within the meaning of 10 C.F.R. 212.31.[3] Plaintiffs claimed that their allowances were attributable to differences in type of purchaser and location between themselves and all other Mobil dealers.

All Mobil retail dealers—both N and OG&L—in the Detroit resale district were charged the same price for gasoline, i.e., the dealer tankwagon price. Those N dealers who received a competitive allowance paid the full dealer tankwagon price but received a monthly refund based upon the number of gallons of gasoline purchased during the month.

The basis of plaintiffs' complaint in the district court, as it had been in the earlier administrative proceeding which they had instituted, was the allegation that Mobil improperly withdrew their respective allowances on gasoline purchased from Mobil. In fact, the Pre-trial Order, which controlled the course of the trial, defined plaintiffs' claim as follows:

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[2] Mobil's term for service station dealers who lease their stations from Mobil.

[3] The FEA's Mandatory Petroleum Price Regulations, 10 C.F.R. Part 212.31, define "customary price differential" as follows:

> Customary price differential includes a price distinction based on a discount, allowance, add-on, premium, and an extra based on a difference in volume, grade, quality, or location or type of purchaser, or a term or condition of sale or delivery.

> Plaintiffs' claim. The withdrawal of allowances being paid to the plaintiffs per gallon of gasoline on May 15, 1973, was a violation of regulations promulgated by the Federal Energy Office (now Federal Energy Administration) which required the defendant to maintain customary price differentials in effect as of that date for a class of purchasers, of which plaintiffs are a part, consisting of all Mobil "N" dealers (those owning their stations as opposed to those who leased their stations) who received allowances from defendant.

That Pre-Trial Order further framed plaintiffs' statement of the legal issues involved as follows:

> A. Plaintiffs' statement of legal issues.
>
> 1. Whether all N dealers in the Detroit Resale District who received allowances as of May 15, 1973 is the appropriate "class of purchaser" for the purpose of 10 CFR § 212.31.
>
> * * * *
>
> 5. Whether defendant violated FEA regulations, 10 CFR § 212.1, et seq., requiring Mobil to maintain customary price differentials in effect as of May 15, 1973 for a class of purchasers, of which plaintiffs are a part, consisting of all Mobil N dealers in the Detroit Resale District who received an allowance from Mobil, by withdrawing said allowance.

It was upon the foregoing factual and legal issues that the case proceeded to trial in the district court. In opening statement to the court, plaintiffs stated that they would prove:

> (That) these were their dealers; that they had contracts; that they were receiving the allowances; that the allowances were withdrawn; that the allowances were in effect on May 15 of 1975 are matters which, for the most part, constitute our prima facie case.

> We are showing primarily that these were dealers; that they were a separate class of purchaser by virtue of being dealers who received competitive allowances from this district, and as a result, the defendant, Mobil was under a duty to compute a weighted average for that class of purchasers. . . .

Mobil contended that plaintiffs' allowances at issue here were granted solely for competitive reasons and, therefore, were not "cost justified" customary price differentials as defined in the Regulations.[4] Mobil argued that the withdrawal of plaintiffs' respective competitive allowances in the summer and fall of 1973, at the time of the gasoline shortages created by the Arabian oil embargo, was proper and necessary because the competitive market conditions which gave rise to such allowances no longer existed. Those shortages had first brought about voluntary regulation and then federal regulations of gasoline allocation.

These plaintiffs had first submitted their written protest to the Federal Energy Administration (FEA) and, upon the basis of that prior submission to the FEA, Mobil moved to dismiss the complaint in this case for plaintiffs' failure to exhaust administrative remedies. That motion was denied by the district court in a Memorandum and Order dated October 16, 1975.[5] Although unknown to Mobil or the district court at the time of the district court's Order, the FEA had responded to plaintiffs' charges, had denied that Mobil's withdrawals of the allowances were in violation of FEA price regulations, and had invited each of the plaintiffs to submit any documentation they had which would indicate that Mobil had granted the competitive allowances for cost-justified reasons. Plaintiffs did not respond to this invitation from the FEA.

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[4] See note 3, *supra*.

[5] Reported at 402 F.Supp. 368 (E.D.Mich. 1975).

This case was tried to the court in March 1977. Thereafter, Judge Joiner's August 2, 1977 Memorandum Opinion acknowledged at the outset the precise nature of plaintiffs' claim:

> . . . This is a suit for monetary damages brought by four of one hundred twenty Detroit area owner-dealers of Mobil Stations [hereinafter referred to as "N" dealers] alleging that the Mobil Oil Corporation ["Mobil"] violated certain of these regulations by discontinuing certain "competitive discounts" on purchases by these "N" dealers that had been in effect on May 15, 1973 under retail dealer contracts.
>
> It is the claim of the plaintiffs that in the Detroit Resale District, "N" dealers who were receiving "competitive discounts" as of May 15, 1973 constitute a "class of purchaser" as defined by FEA regulations and that these "competitive discounts" given to the members of this class constituted a "customary price differential" as used in those regulations. Plaintiffs contend that the failure of Mobil to continue this "customary price differential" to this "class of purchaser" violated a regulation of the FEA requiring that such price differentials be maintained.

In that Memorandum and Order the court held against plaintiffs' claim that the appropriate class of purchaser was N dealers receiving allowances and that their allowances were "cost justified." The court found (Finding No. 8) that "the Detroit resale district is one of Mobil's most competitive marketing areas in the United States" and, in holding that the allowances were competitive in nature, stated:

> The court, however, finds no evidence to support the argument that the discounts given to this smaller number of "N" dealers (the evidence shows that 60 of the 120 "N" dealers in the Detroit Resale Area

> received such discounts) were based on anything other than the necessity of meeting bona fide competition from other oil companies wanting to have these stations sell their own brand of gasoline.

Inasmuch as these allowances were truly competitive in nature, they were properly withdrawn by Mobil at the time of the shortages created by the Arabian oil embargo, that is to say, at the time when the competitive conditions which originally prompted the discounts no longer existed. At that point, having denied the relief sought by plaintiffs and having disposed of the issues herein, the court should have entered final judgment for the defendant and against the plaintiffs.[6]

The district court, however, then proceeded, *sua sponte*, to decide a claim that was never presented to it. It was neither pleaded nor tried. The court concluded that Mobil's N dealers and OG&L dealers comprised two different classes of purchasers because there existed hidden "cost-justified", "customary price differentials" between them and that Mobil should have computed a separate base price for each class.

In arriving at that conclusion, the district court found:

> Finding No. 22. Mobil has no expenses relating to the upkeep, ownership or leasing of property on which the stations of plaintiffs and other N dealers are located. . . .
>
> Finding No. 31. Mobil realized cost savings and advantages from doing business with N dealers which cost savings and advantages were not realized when doing business with OG&L dealers.

Those costs "relating to the upkeep, ownership or leasing of property" which the N dealers confront could

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[6] See this court's opinion in *Mr. Magic Car Wash v. Department of Energy*, 596 F.2d 1023 (TECA) 1978. See also *Merry Twins, Inc., et al. v. Exxon Corporation*, 611 F.2d 874 (TECA) 1979.

only relate to or be compared with the rentals which the OG&L dealers were required, by separate contracts, to pay to Mobil. But this court has heretofore held in *Shell v. FEA*[7] that there is no relationship (under the Emergency Petroleum Allocation Act of 1973 (EPAA))[8] between service station rents and gasoline prices. This court in *Shell* held that the FEA does not have authority to control rents charged for service station property. As the district court stated in *Shell*, (affirmed here on appeal):

> Unlike the Economic Stabilization Act of 1970, the Allocation Act has not given FEA specific authority to control rents of service station properties. Only the authority to control gasoline prices has been given. . . .
>
> * * * *
>
> The FEA's position is that the rents charged to service station operators is so inextricably interwoven with the prices which they pay for gasoline from Shell that the regulation of prices would be frustrated unless the FEA has also the authority to control the rents charged. The only factual basis for the argument is that some of the rents are expressed as a flat rate in cents per gallon and are therefore a combined charge to the retailer by the supplier for the purchasing and retailing of gasoline. *It is, however, common in many businesses to express rent on a basis which is related to sales, and Shell's service station rentals and its gasoline sales are contracted for under separate agreements.* . . . (Emphasis supplied.)
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> * * * *

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[7] *Shell Oil Company v. Federal Energy Administration*, 400 F.Supp. 964 (S.D.Texas 1975), aff'd 527 F.2d 1243 (TECA) 1975. *See also Atlantic Richfield Co. v. Zarb*, 532 F.2d 1363, 1370 (TECA) 1976.

[8] 87 Stat. 628, 15 U.S.C. See 751, *et seq.* (1975 Supp.).

> The mere fact that many leases provide that rent is to be determined on the basis of cents per gallon does not make prices and rents inextricably woven together so that they become legally identical. *Rents are not prices*; Congress recognized the difference in the Stabilization Act by providing for both. In the Allocation Act, Congress included prices but excluded rents. . . . (Emphasis supplied.)

400 F.Supp. 968-970.

In reaching the conclusion of two classes of purchasers, the district court here relied upon Example 6 in FEA Ruling 1975-2. However, our ruling in *Shell, supra,* coming as it did after the promulgation of Ruling 1975-2, effectively invalidated any effort to bring filling station rentals, or costs of the "upkeep, ownership or leasing of property" into the ambit of the Emergency Petroleum Allocation Act.

We hold that, under the applicable FEA regulations, all Mobil retail service station dealers, both N dealers and OG&L dealers, in the Detroit resale district comprise one class.

In view of our holding here, we do not reach the other issues raised by appellant in this appeal.

The judgment of the district court is reversed, with instructions to enter judgment for the defendant and against the plaintiff.

REVERSED.

LARSON, District Judge, concurring.

I respectfully join in the decision insofar as it holds that final judgment for the defendant and against the plaintiffs should have been entered once the District Court determined that the allowances were competitive in nature and therefore properly withdrawn by the defendant. My review of the record indicates that the claim that the Mobil N dealers and the Mobil OG&L dealers constituted separate classes of purchaser was not properly before the District Court. Our opinion need go no further. The discussion of the majority regarding FEA Ruling 1975-2 is, however, unnecessary to the resolution of this case.

Furthermore, it is my opinion that this Court's decisions in *Shell Oil Co. v. Federal Energy Administration*, 527 F.2d 1243 (TECA 1975), and *Atlantic Richfield Co. v. Zarb*, 532 F.2d 1363 (TECA 1976), would not have foreclosed the result reached by the District Court herein had the claim been properly before the court. Ruling 1975-2 does not represent an attempt to control rents, but rather represents an attempt to define who constitute the appropriate classes of purchaser under the energy regulations. This Court in the *Shell Oil* case recognized that some consideration of the status of the dealer vis-a-vis the supplier-manufacturer of the gasoline would be necessary in some circumstances:

> "The FEA contends that these [rent] regulations prevent the frustration of its petroleum price regulations. But, while the rent charged by the lessor for real property used in retailing gasoline will affect the total cost of the retailer-lessee's operation, it is only when the lessor of the real property and the supplier of the gasoline to be marketed at that site are one and the same that any increase in rent could possibly be construed as a hidden increase in the price of gasoline. The rent regulations promul-

gated by the FEA are not limited to this situation." 527 F.2d at 1246.

By implication, therefore, when the lessor of property is also the gasoline supplier for a lessee-dealer, that relationship can have an impact on the pricing of the gasoline. Ruling 1975-2 recognizes as much. It does not allow the FEA (now the DOE) to regulate the rent charged but it does require in some circumstances that those dealers who rent from the supplier be treated as a separate class of purchaser.

A principal function of the class of purchaser concept is to preserve the price distinctions among purchasers that customarily existed under free market conditions. By construing practical distinctions based upon the relationship between the dealer and the supplier of gasoline to fall within the proscription on regulating rents, this Court will further hamper the DOE in its efforts to carry out the mandate of Congress to effectively regulate gasoline prices in the United States.

APPENDIX C

¶16,042

Ruling 1975-2

Class of Purchaser; Application of Term Under Petroleum Price Regulations

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Note: Additional information on "class of purchaser" concept may be found in Rulings 1974-17 and 1974-18 at ¶16,027 and 16,028. These should be consulted in applying this rule. Ruling 1975-2 is controlling.

In Rulings 1974-17 and 1974-18 (39 F. R. 21042, June 18, 1974), the Federal Energy Administration set forth guidelines with respect to the meaning of the terms "class of purchaser" and "customary price differential" as defined in 10 CFR 212.31 and used in FEA's pricing regulations, 10 CFR, Chapter II, Part 212. While those rulings helped to clarify the application of the "class of purchaser" concept, it has subsequently come to FEA's attention that those rulings did not resolve all outstanding questions and that to some extent the rulings themselves have been misconstrued. This ruling is intended, therefore, to clarify further the application of the class of purchaser concept by supplementing Rulings 1974-17 and 1974-18. To the extent that there is any inconsistency between this ruling and those earlier rulings, this ruling will be controlling. Because of the complexity of this issue, this ruling will first discuss the general principles involved, and then illustrate some of those principles with factual examples.

Discussion

A. *Background*

FEA price regulations provide generally that sellers may charge prices for covered products that reflect their May 15,

1973 lawful selling prices and a dollar-for-dollar pass-through of the amount by which their product costs have increased since that time. Thus, each selling price determined under FEA price regulations has at least two components: that portion which represents a May 15, 1973 lawful selling price and that portion which represents a pass-through of increased product costs. In addition, a further increment to some selling prices is permitted, subject to certain conditions, to reflect increased non-product costs.

The portion of the selling price that represents a May 15, 1973 selling price is, with respect to each product sold to each buyer " . . . the weighted average price at which the item was lawfully priced in transactions with the class of purchaser concerned on May 15, 1973 . . ." (§ 212.82(b); § 212.93(a)).

In making the computation of this "weighted average price . . . in transactions with the class of purchaser concerned on May 15, 1973," a firm ". . . not exclude any temporary special sale, deal or allowance in effect on May 15, 1973." (§ 212.82(b); § 212.93(b)).

Since increased product costs are generally required to be applied equally among classes of purchaser of a particular covered product, differences in weighted average May 15, 1973 selling prices among classes of purchaser are generally reflected in like differences in current lawful selling prices for that product among those classes of purchaser, and a principal function of the class of purchaser concept is to preserve the price distinctions among purchasers that customarily existed under free market conditions. To achieve the objective of making covered products available at equitable prices, FEA regulations require sellers to group together customers that are similarly situated and to compute a weighted average of their May 15, 1973 selling prices in sales to those customers. Sellers are thus required to maintain a single lawful price for a product to all customers that fall into a

particular class, rather than having to establish individual maximum lawful prices to individual customers.

As noted above, sellers must compute for each product a single weighted average May 15, 1973 price for each class of purchaser of that product. From the standpoint of the seller, the number of different classes of purchaser for which it computes separate weighted average May 15, 1973 prices will in most cases have no direct bearing on the amount of cost recovery or profits realized. The principal function of the doctrine is to maintain the price differentials that existed on May 15, 1973 between groups of purchasers which were not similarly situated then and are not now similarly situated.

That the maintenance or elimination of separate classes of purchaser will ordinarily have no bearing on the cost recovery or profits of the seller can be shown in a simplified example, as follows: A firm sold gasoline on May 15, 1973, with 50 percent of its sales at retail, at a weighted average retail price of 25 cents per gallon, and 50 percent of its sales at wholesale, at a weighted average wholesale price of 17 cents per gallon. That firm, if it were to disregard the distinctions between its classes of wholesale and retail purchasers entirely, would calculate a single weighted average May 15, 1973 selling price of 21 cents per gallon for all of its gasoline sales, as to which it would then apply its increased product costs. In such a case, the firm would not recoup any greater amount of increased product costs or realize any greater profits than if it had treated its retail and wholesale customers as separate classes of purchaser, with separate weighted average May 15, 1973 selling prices, assuming that its ratio between wholesale and retail sales remained at 50-50. Only if the ratio between its total wholesale and retail sales changed would the firm's revenues (and, potentially, its profits) be affected by whether or not separate classes of purchaser had been established for wholesale and retail sales.

The significance of the application of the class of purchaser concept is, therefore, principally to be found in its im-

pact on the relative prices among buyers from a particular seller, rather than in any impact on the increased product cost recovery or profits of a seller.

B. *Guidelines for Determining Classes of Purchaser*

This ruling is intended to provide further guidance to sellers in making price distinctions between different purchasers, by reviewing some of the pertinent factors which must be considered in making class of purchaser determinations. This ruling also is to provide guidance concerning certain specific kinds of circumstances which involve Robinson-Patman Act considerations, and which are known to be the source of particular difficulty with respect to this issue.

The basic guidelines for class of purchaser determinations are set forth in § 212.31, where the term "class of purchaser" is defined as:

"purchasers or lessees to whom a person has charged a comparable price for a comparable property or service pursuant to customary price differentials between those purchasers or lessees and other purchasers or lessees."

The term "customary price differential" is defined in the same section as including:

"a price distinction based on a discount, allowance, add-on, premium, and an extra based on a difference in volume, grade, quality, or location or type of purchaser, or a term or condition of sale or delivery." Both of these definitions were carried over virtually verbatim from the Economic Stabilization Regulations; 6 CFR 150.31, 38 FR 21592(1973) (and 6 CFR 150.352, 38 FR 22536) which were applicable generally to all sellers of goods and services, including petroleum products.

In order to clarify the application of these definitions, FEA issued, on June 12, 1974, Rulings 1974-17 and 1974-18. Ruling 1974-17 stated that it was unlawful currently to charge different prices to individual purchasers which were members

of the same class, even though those individual purchasers paid different prices on May 15, 1973. In that Ruling, FEA made it clear that:

"A class of purchaser is . . . the smallest unit for which a uniform selling price may be computed because, by definition, no customary price differentials exist within a class of purchaser. It should be noted, however, that a class of purchaser may consist of only a single customer, if that particular customer alone was charged a comparable price for a comparable property or service pursuant to a customary price differential between the customer and all other customers."

Thus, Ruling 1974-17 dealt only with a single class of purchaser, and described the proper means of determining a single weighted average May 15, 1973 price to that class of purchaser.

Ruling 1974-18 dealt principally with the issue of whether certain discounts constitute a "customary price differential" for purposes of determining whether separate classes of purchaser exist. In that ruling, FEA stated that a discount off the published dealer tankwagon price for gasoline given on January 1, 1973 to "Company A," a "high volume retail outlet in a favorable location," as a "competitive inducement" of indefinite duration for it to continue to purchase gasoline from the supplier, and in effect on May 15, 1973, was "customary," but that a discount in effect on May 15, 1973, given to Company B on April 15, 1973 as "a form of subsidy" to be effective only so long as a "price war" situation lasted, was not "customary." Thus, Ruling 1974-18 stated that, with respect to the described types of discounts, FEA would look to whether the parties intended the discount to be temporary or customary. In order to assist in making that determination, Ruling 1974-18 created the following presumption:

"[FEA] will generally regard any discount that was in effect on May 15, 1973, and that had either been in effect or had been granted for a period of six months or more, to be a

customary discount. This presumption may be rebutted in particular situations by appropriate factual showing."

Ruling 1974-18 also made it clear that even though the supplier was not required to maintain a separate class of purchaser with respect to its temporary discount sales, it nevertheless had to take that lower price into account in computing its May 15, 1973 weighted average lawful selling price with respect to all customers in the class of purchaser concerned. As noted above, §§212.82(b) and 212.93(d) require that in determining that weighted average May 15, 1973 price, all temporary special sales, deals or allowances have to be taken into account. Thus, Rulings 1974-17 and 1974-18 serve to make clear that, as to any particular class of purchaser, only a single price can be charged and that, for purposes of distinguishing between "customary" price differentials and "temporary" price differentials, there would be a presumption that discounts that had been in effect for at least six months on May 15, 1973, or which were in effect on May 15, 1973 and had been granted for a period of at least six months, represented customary price differentials.

The existence of a discount on May 15, 1973, is, however, only one of several key elements which must be considered with respect to making class of purchaser determinations. The purpose of this ruling is to set out more explicitly the other key elements that must be taken into account in determining the existence of separate and distinct classes of purchaser.

The determination of what constitutes a "comparable price" charged pursuant to a "customary price differential" should begin with the §212.31 definition of "customary price differential," which, as indicated above, lists illustrative factors to be taken into account, to include:

"a price distinction based on a discount, allowance, addon, premium, and an extra based on a difference in volume,

grade, quality, or location or type of purchaser, or a term or condition of sale or delivery."

The principal significance of the first portion of this definition, which refers to "a discount, allowance, add-on, premium, and an extra," is to indicate that a "price distinction" may exist not only because of different selling prices for a product, but may, in fact, exist even though selling prices are equal. Thus, although two purchasers may have purchased the same product at the same price on May 15, 1973, one price may have reflected a particular type of "allowance," whereas the other price may not have, so that the two purchasers could not appropriately be placed in the same class of purchaser.

The second portion of the definition, which adverts to the illustrative factors which may account for price distinctions, however they are expressed, is of particular significance in determining the classes of purchaser of each seller. For purposes of this ruling, the important factors aside from grade or quality, which do not require extended discussion herein, are differences in:

(1) location,

(2) type of purchaser,

(3) volume, and

(4) term or condition of sale or delivery.

These factors, in the order listed above, provide a logical sequence for making class of purchaser determinations.

Although price differentials may reflect differences in location both of the seller's outlet or distribution point and of the buyers's place of business, location should be considered first as it relates to the seller. To the extent that a seller has multiple locations from which it distributes products, it should make its class of purchaser determinations on a location-by-location basis. Only to the extent that it can ultimately be determined that no customary price differentials

were reflected between a seller's prices at two or more locations would it be possible for a seller to treat sales from such locations as being to the same class of purchaser.

In evaluating its sales from a particular location, a seller should next look to the types of customers it had, on May 15, 1973, for purposes of making price determinations. There are certain readily apparent distinctions to be made in this regard, such as those relating to recognized levels of distribution (*e.g.*, wholesale, retail, end-user, etc.), those relating to methods of sale (*e.g.*, branded, non-branded), and those relating to types of use (*e.g.*, re-sale, industrial, commercial, residential, etc.). It should be noted in this regard that although certain industry-wide practices have existed in regard to certain "customer types," as to which customary price differentials existed, other practices as to price distinctions based on customer types may have varied from seller to seller, depending on circumstances.

Having determined those types of customers which were treated differently from other types of customers for pricing purposes on May 15, 1973, a firm must next determine, as to each such type of customer, the extent to which prices of product were differentiated according to volumes purchased (*e.g.*, sales in cargo lots, barge sales, pipeline sales, tankwagon sales, sales made pursuant to a sliding volumetric discount scale, etc.).

Finally, a firm must determine, as to sales to each group of purchasers identified under the foregoing criteria (those purchasers which bought at a price reflecting the seller's location, the type of purchaser involved, and the volume of product involved), the extent to which customary price differentials reflected differences in terms or conditions of sale or delivery on May 15, 1973. Such differences in terms or conditions may, of course, simply reflect purchaser delineations already made under other criteria, such as, for example, those respecting sales to branded and to non-branded dealers. Differing terms or conditions of sale or delivery may, however,

also serve to delineate still further classes of purchaser which are not distinguishable under the other criteria.

A firm may, for example, make its product available to some customers on a delivered basis and to others at its terminal. Such a difference in the terms of sale to otherwise indistinguishable purchasers would serve as the basis for a customary price differential between groups of purchasers, and thereby establish separate classes of purchaser.

It is in this area of differing terms and conditions of sale, and particularly where such terms and conditions, including price terms, were established by written contract on May 15, 1973, that class of purchaser determinations become most difficult.

In some instances, the fact that sales were made pursuant to contractual terms and conditions may serve to distinguish those purchasers from purchasers that did not buy under contract, and in others it may not. For example, if a seller sold a product to both contract and non-contract purchasers on identical terms and conditions, there would be no basis for establishing separate classes of purchaser. If, however, a firm's contract purchasers were generally those purchasers that bought all of their requirements from the firm over a given time period, whereas the firm's non-contract purchasers bought from the firm only on an occasional and unpredictable basis, and if this difference in methods of purchaser were reflected in a customary price differential, it would not be proper for the selling firm to place its contract and non-contract purchasers in the same class.

In cases where all of the foregoing analysis has been made, and a firm's purchasers have been grouped into appropriate categories, there may nevertheless exist differences in prices charged to purchasers within those groups. Such differences might simply reflect the varying competitive situations at the various times when contractual prices were agreed to, or they may, upon closer examination, represent customary price differentials that have resulted from factors

which may not even have been consciously adverted to at the time, but which nevertheless can be objectively verified.

It is in this area, where purchasers are ostensibly similarly situated, that price distinctions become potentially at odds with the policies intended to be furthered by the Robinson-Patman Act.

Pricing structures in the petroleum industry, and particularly discount practices, reflect the requirements of the Robinson-Patman Act amendments to the Clayton Act, 15 U.S.C. § 13, and the numerous Federal Trade Commission and federal court decisions which have applied that Act to the petroleum industry. Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, provides in pertinent part:

"It shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . ." 15 U.S.C. § 13(a).

Thus, a seller is prohibited from discriminating in price between two of its customers if the effect of such discrimination may be substantially to lessen competition or to injure, destroy or prevent competition with any person who either (i) grants the discrimination (so-called primary line injury); (ii) knowingly receives the benefit of the discrimination (secondary line injury); or (iii) is a customer of the person receiving the benefit of the discrimination (tertiary line injury).

The Robinson-Patman Act recognizes two principal types of exceptions to the general policy against discrimination bet-

ween two customers. The first, commonly referred to as the "cost justification" defense, is:

"That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered . . ." *Id.*

A second, and much narrower, exception, referred to as the "meeting competition" defense, provides:

"Upon proof being made . . . that there has been discrimination in price or service or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, . . . *Provided however*, that nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." (Cayton Act, § 2(b), 15 U.S.C. § 13(b).

Thus, despite common use of the term "competitive discount" to include discounts such as volume discounts, a true "cometitive" or "meeting competition" discount within the meaning of the Robinson-Patman Act is only (a) one which is extended in good faith to meet an *actual* lower offer made to the purchaser by the supplier's competitor in an individual competitive situation, *FTC* v. *A.E. Staley Mfg., Co.*, 324 U.S. 746, 753 (1945); *cf. Callaway Mills Co.* v. *FTC*, 362 F.2d 435 (5th Cir. 1966), or (b) one by which the supplier subsidizes a dealer in order that the *dealer* can compete effectively in a local price war situation, provided that the dealer's competitors are also being subsidized by *their* suppliers. See *FTC* v. *Sun Oil Co.*, 372 U.S. 505, 512 n. 7 (1963). Since the burden of proving the competitive discount justification under § 2(b) is on the defendant, many sellers, including many oil companies, have historically provided such a dis-

count only where the customer executed an affidavit to the effect that it had received an offer of an equally low price from its supplier's competitor. A seller which extends a competitive discount is under an obligation to determine from time to time whether the competitive situation which created the justification for the discount continues to exist, especially where intervening economic conditions should put the seller on notice that there has been a restructuring of competitive conditions in the marketplace. See *In re Beatrice Foods Co.*, 68 F.T.C. 286, 350-51 (1965).

Thus, price differentials between different purchasers which tend substantially to lessen competition are consistent with the Robinson-Patman Act if they (1) are cost justified; or (2) are necessary in good faith to meet competition. For purposes of applying its pricing regulations, FEA will assume that all discounts and price differentials in effect on May 15, 1973, were permissible under the Robinson-Patman Act.

FEA's class of purchaser requirements are intended to be and should be construed as being consistent with requirements of the Robinson-Patman Act. Thus, in determining whether a price differential in effect on May 15, 1973, was a customary differential which shall be maintained with respect to a class of purchaser, FEA will take into account whether the differential in question falls into one of the categories of differentials justified under the Robinson-Patman Act.

If a price differential was justified under that Act because it reflected cost savings to the supplier and that differential is otherwise determined pursuant to FEA regulations to represent a "customary" price differential, FEA will generally require that a class of purchaser be established to reflect that differential, since presumably the justifications under the Robinson-Patman Act are as valid currently as they were on May 15, 1973.

If, howerver, a price differential can be justified only as a competitive discount under § 2(b) (i.e., made in good faith

to meet an actual lower bona fide offer or to offset a price war subsidy of a competitor), FEA will not require that a separate class of purchaser be established to reflect that differential. This is so because such dramatic changes in the pricing and competitive structure of the petroleum industry took place during the summer and fall of 1973 that it is unlikely, at least in the absence of FEA price controls, that a supplier could, at any time after September 1, 1973, justify in a Robinson-Patman Act suit a competitive discount if it existed exclusively on the basis that it was necessary to meet a lower offer made by a competitor on or before May 15, 1973. Moreover, a true competitive discount does not fall within any of the factors listed in § 212.31 to be taken into account in determining a customary price differential.

The foregoing policy of allowing suppliers to eliminate price differentials originally given in response to local competitive conditions is consistent with the general policy of the class of purchaser doctrine to require sellers to give similar prices to purchasers which are similarly situated, and not to require that random price differentials be maintained. This policy will be followed both at the reseller-retailer level, where potential conflict with the Robinson-Patman Act is readily apparent, and at the end-user level, where there is less likely to be actual competition between purchasers and therefore less possibility of conflict with the Robinson-Patman Act at the end-user level, maintenance of price differentials at the end-user level might still, in particular circumstances, result in a lessening of competition, particularly at the primary line level, as well as frustrate the general policy of allowing random price differentials to be eliminated.

It is important to point out, however, that certain discounts may have been "competitive discounts" in form, having ostensibly been granted to meet a lower offer and with an affidavit having been executed by the buyer to that effect, but may nevertheless also be cost justified under the Robinson-Patman Act. For example, a retail gasoline dealer that owns its retail facility may have been able to obtain a discount

from its supplier that was made in good faith to meet a lower bona fide offer. But the willingness of sellers on May 15, 1973 to afford such discounts also reflected cost savings to such sellers, by virtue of the fact that other sales by such sellers were to customers that operated retail facilities owned by and leased from the sellers, and the rental for the facilities was reflected, in part, in the purchase price of gasoline. Similarly, "competitive" discounts on May 15, 1973 may have reflected cost savings attributable volumes purchased or to the fact that the sales were to non-branded rather than branded buyers, since in sales to non-branded customers sellers ordinarily do not incur certain expenses or do not provide certain services (such as a trademark license) that are incurred or provided in connection with sales to branded customers.

Thus, as a general rule the FEA will not require classes of purchaser to be established to maintain price differentials which on May 15, 1973 were in effect only to meet an equally low offer of a competitor. But the FEA will look behind broad assertions that a particular differential was a "competitive" discount and will determine whether in fact the differential was extended to meet a competitive offer and, even if it was, whether it was equally justifiable on a cost basis. Where there is an equally strong cost justification for a "competitive" discount, FEA will require it to be continued.

The position taken herein obviates most of the need for the presumption in Ruling 1974-18, noted above, to the effect that a discount on May 15, 1973 that had been or was expected to be in effect for six months or more is "customary." The presumption was intended to provide guidance primarily on the issue of whether a truly transitory *competitive* discount was "customary." Since this Ruling concludes that competitive discounts in effect on May 15, 1973 may generally be weight averaged to determine a single price for all purchasers in a class, regardless of the length of time they were intended to be in effect, the presumption is no longer necessary, with respect to such discounts. Cost justified discounts, on the

other hand, are generally to be considered "customary" regardless of the length of time they had been or were intended to be in effect as of May 15, 1973. Ruling 1974-18 continues to have viability, however, insofar as it provides a means of distinguishing special, short-term sales and other temporary allowances that were neither cost justified nor given in response to competitive conditions, and which represented random price differentials, from longer-term discounts, which are more likely to reflect differences in longer-term discounts, which are more likely to reflect differences in location, volume, type of purchaser, etc., and therefore to represent "customary" price differentials.

C. *Class of Purchaser Membership*

Rulings 1947-17 and 1974-18 have been incorrectly construed by some persons as requiring a supplier generally to maintain certain discounts in effect on May 15, 1973 to the *same purchasers* which received them on that date, possibly because the rulings were stated as hypothetical examples involving particular purchasers. No such construction was intended, however. Rather, a supplier must maintain the applicable customary price differential to the same *class* of purchaser. The membership of the class is to be determined by the same objective standards applied by the seller on May 15, 1973. Thus, for example, if a particular customer was receiving a volume discount on May 15, 1973 because its purchases exceeded a certain prescribed volume, the seller does not have to continue to offer the applicable price differential to the same purchaser if that purchaser's volumes decline below that level. On the other hand, a seller is required currently to offer such a price differential to a purchaser which now meets the minimum prescribed volume, even though it may not have done so on May 15, 1973.

While membership in a particular class of purchaser is to be determined by objective standards in effect on May 15, 1973, FEA reiterates the position taken in Ruling 1974-17 that a class of purchaser may have only one member, particularly

at the end-user level, where a price to a very large volume end-user was often determined on an individually-negotiated basis and reflected a customary price differential between that end-user and all other end-users.

D. *Application of This Ruling*

The class of purchaser concepts described in this ruling will be applied by FEA in determining the lawfulness of all prices charged by sellers of covered products since August 19, 1973, the effective date of Phase IV of the Cost of Living Council's price regulations applicable to the petroleum industry. In other words, sellers which have failed, at any time after August 19, 1973, to maintain distinct classes of purchaser and to reflect customary price differentials, as described herein, will be subject to appropriate remedial action, including appropriate refunds. The remedial actions to be taken or sanctions to be imposed with respect to departures from the class of purchaser requirements as expressed in this ruling will be determined on a case-by-case basis, taking into account the extent to which sellers can establish, with respect to past class of purchaser determinations, a good faith basis under the regulations of the manner in which those determinations were made and the extent to which these matters were resolved in prior compliance proceedings.

FEA recognizes that the general rules stated herein for determining what constitutes a separate and distinct class of purchaser for purposes of FEA pricing regulations may not be easily applicable to all of the myriad types of price differentials that existed in May 15, 1973, and that the strict application of these rules might in fact achieve a result contrary to the general goal that purchasers which for all practical purposes are similarly situated should be grouped in the same class of purchaser. Therefore, to the extent that strict application of the class of purchaser doctrine, as interpreted herein, does not achieve the desired result or is impractical, both purchasers and sellers adversely affected should, pursuant to Subpart D of 10 CFR, Part 205, promptly apply to the FEA

for an exception from the class of purchaser rule. Similarly, any seller which finds the application of this ruling to its business to be unclear should promptly submit to FEA the relevant facts together with a request for interpretation of those aspects of the ruling applicable to its particular factual situation.

The foregoing general principles are illustrated by the following examples, which are equally applicable to all sellers, including refiners, resellers, reseller-retailers and retailers.

Example 1: On May 15, 1973, Firm A, a refiner, had in effect posted dealer tankwagon prices for gasoline at terminals in City A and in City B. The price in City A was 13.2 cents per gallon and in City B was 13.9 cents per gallon. All sales of gasoline by Firm A at these terminals to gasoline retailers were made at posted prices on May 15, 1973.

The difference in price between those retailers which purchased from Firm A in City A and those retailers which purchased from Firm A in City B is a "customary price differential," which reflects a difference in location of the seller, and which must be preserved by establishing separate classes of purchaser for the respective terminals. The maintenance of price distinctions between City A and City B is ordinarily not objectionable under the Robinson-Patman Act, except in rare instances, because buyers from one terminal are presumably not in competition with buyers from another terminal and/or because such differentials reflect cost savings, such as those relating to Firm A's differing costs of transporting the product to different locations.

Example 2: On May 15, 1973, Firm B, a refiner, had in effect at a particular terminal posted prices for gasoline as follows: (a) a cargo buyer price of 12 cents per gallon, (b) a jobber tanker price of 13 cents per gallon, (c) a dealer tankwagon price of 15 cents per gallon, and (d) an end-user tankwagon price of 16.5 cents per gallon. All sales of gasoline by Firm B at this terminal were made at posted prices on May 15, 1973.

The differences in price between those buyers which bought pursuant to these postings are "customary price differentials" which reflect the different types of purchaser involved and which must be preserved by establishing separate classes of purchaser for each type. The maintenance of these price distinctions between types of purchaser is ordinarily not objectionable under the Robinson-Patman Act because purchasers in one category usually do not compete with purchasers in another category, and the price differentials involved are therefore not likely to lessen competition substantially or to injure a competitor.

Example 3: On May 15, 1973, Firm C, a refiner, had in effect at a particular terminal a posted dealer tankwagon price for gasoline of 15 cents per gallon. All sales of gasoline to branded retailers made by Firm C at this terminal on May 15, 1973 were at the posted price; whereas all sales of gasoline to non-branded retailers made by Firm C at this terminal on May 15, 1973, were at a discount of 1.0 cents per gallon from the posted price of 15 cents per gallon.

The price differential between branded retailers and non-branded retailers is a "customary price differential" which reflects the differences in services and benefits afforded to those respective types of purchasers by Firm C. This kind of price distinction between branded and non-branded retailers is ordinarily not objectionable under the Robinson-Patman Act and for FEA purposes will have been presumed to have been cost-justified on May 15, 1973; it will therefore continue to be so regarded.

Example 4: On May 15, 1973, Firm D, a refiner, had in effect at a particular terminal a posted dealer tankwagon price for gasoline of 15 cents per gallon. All sales of gasoline to retailers made by Firm D at this terminal on May 15, 1973, were at the posted price, except that Firm D, pursuant to a volume discount schedule, gave discounts from this price of 0.5 cents per gallon for purchases in excess of 50,000 gallons per month, 0.75 cents per gallon for purchases in excess of

75,000 gallons per month, and 1.0 cents per gallon for purchases in excess of 100,000 gallons per month.

Such "volume" discounts are "customary price differentials" reflecting differences in volume of product purchased, and must be maintained through establishment of separate classes of purchaser. The maintenance of these price distinctions according to volumes purchased is not objectionable under the Robinson-Patman Act because they were presumptively cost-justified on May 15, 1973, and will therefore continue to be so regarded.

Example 5: On May 15, 1973, Firm E, a refiner, had in effect at a particular terminal a posted end-user tankwagon price for gasoline of 16.5 cents per gallon. While Firm E had no generally applicable volume or other discount schedule available for end-users, it did make available to most of its very high volume end-users certain discounts from the end-user tankwagon price, the amounts of which were determined on an individually negotiated basis. Some such discounts were granted after an equally low offer had been made by a competitor, but others had no such apparent rationale.

In such situation, it is apparent, notwithstanding the fact that certain of the end-user discounts Firm E had in effect on May 15, 1973, were ostensibly granted to meet competition, that for pricing purposes Firm E distinguished its large and small volume end-user customers principally on the basis of volumes purchased. Therefore, Firm E is required to establish a separate class of purchaser for its one or more other classes of purchaser for its high volume end-user purchasers. For each class Firm E is required to establish a separate base price by computing the weighted average price to all customers in the class on May 15, 1973, taking into account all temporary or permanent discounts and allowances. The maintenance of these price differentials between high and low volume customers were presumptively valid under the Robinson-

Patman Act on May 15, 1973 because they were cost-justified, and therefore they will continue to be so regarded.

Example 6: On May 15, 1973, Firm F, a refiner, had in effect at a particular terminal a posted dealer tankwagon price for gasoline of 15 cents per gallon. From this terminal Firm F made sales to 100 branded independent dealers that leased their retail stations from Firm F and to a 100 branded independent dealers that owned their own retail stations or that leased them from lessors other than Firm F. Those dealers that leased their stations from Firm F paid a nominal monthly rental charge to Firm F, but in an amount well below the market value of the property. Firm F extended to 10 of those dealers that did not lease from Firm F various "competitive" discounts off its dealer tankwagon price in order to meet actual lower bona fide offers of competitors. These 10 dealers were distinguishable from the other 90 dealers that did not lease their stations from Firm F only in that they had received competitive offers from suppliers other than Firm F. No competitive discounts were given to any dealers that did lease their stations from Firm F.

It is apparent that Firm F's prices to its dealers which leased their stations from it included an amount which partially compensated Firm F for its rental of real estate. Therefore, there was a sufficient cost-justified distinction between dealers that leased their stations from Firm F, and those that did not, from Firm F to have given the latter a discount consistent with the Robinson-Patman Act. As noted above, a significant distinction between two purchasers on the basis of volume, location, type of purchaser, etc., is sufficient to require that they be placed in separate classes of purchaser, notwithstanding that the seller gave them the same price on May 15, 1973. Thus, Firm F is required to place its dealers that lease their stations from it in a separate class of purchaser from those that do not.

Within the latter group, Firm F had given discounts to 10 dealers on May 15, 1973 to meet equally low offers of

competitors. Since these are true "meeting competition" discounts, Firm F may eliminate them and must place these 10 dealers in the same class of purchaser as the other 90 dealers which do not lease their stations from Firm F. The base price for that class is determined based on the weighted average of the 15 cents per gallon charged 90 dealers on May 15, 1973 and the lower prices charged on that date to the 10 remaining dealers to meet competition. The base price for the class of purchaser which includes dealers which do lease from Firm F is determined based on a May 15, 1973, lawful selling price of 15 cents per gallon.

Example 7: On May 15, 1973, Firm G charged most of its 500 branded dealers a dealers tankwagon price of 15 cents per gallon for motor gasoline. Included in those dealers were 25 which sold gasoline in connection with car wash operations which they owned. Of the 25 car wash dealers, Firm G had given 20 of them various discounts, determined on an individual basis, to meet equally low offers of competitors. Similar competitive discounts were given to four of Firm G's non-car wash dealers. All of the 25 car wash dealers sold approximately equal volumes of gasoline, and all of them had substantially greater capital investments in their stations and sold higher volumes of gasoline than the rest of Firm G's dealers.

The application of the class of purchaser doctrine here should be similar to its application in Example 5. Firm G is required to treat all 25 of the car wash dealers as being in the same class of purchaser and in a distinct class of purchaser from its 475 non-car wash dealers. This is so because the higher volumes and the substantially greater investments in their stations of the car wash dealers are in themselves justifications under the Robinson-Patman Act for treating the car wash dealers differently. Firm G is not required, however, to maintain separate classes of purchaser for those car wash dealers that had discounts in effect are distinguishable from other car wash dealers only in that they had received lower offers from a competitor of Firm G. Similarly, with the non-

car wash class, Firm G need not maintain a separate class of purchaser for four non-car wash dealers that received discounts given only to meet competition. The May 15, 1973 lawful selling price component of Firm G's base price for the non-car wash class is therefore the weighted average of 15 cents per gallon for 471 dealers and the lower May 15, 1973 prices afforded to four dealers; the May 15, 1973 lawful selling price component of its base price for the car wash class of purchaser is the weighted average of 15 cents per gallon for five dealers and the lower May 15, 1973 prices afforded to the other 20 members of the class.

Example 8: On May 15, 1973, Firm H, a refiner, had in effect at a particular terminal a posted dealer tankwagon price for gasoline of 15 cents per gallon, and all sales of gasoline to non-branded retailers were made by Firm H at this terminal on May 15, 1973, at a discount of 1 cent per gallon from the posted price of 15 cents per gallon, except that certain non-branded retailers received additional, "competitive" discounts of from 0.2 to 1.3 cents per gallon. These "competitive" discounts were extended by Firm H in order to meet actual lower bona fide offers to those retailers by competitors of Firm H and in each instance the retailer had executed an affidavit to that effect. All such discounts in effect on May 15, 1973, had been in effect for six months, or had been granted for a period of at least six months.

Firm H's branded and non-branded dealers are sufficiently distinguishable from each other on a "type of purchaser" and cost-justified basis that they must be treated as separate classes of purchaser. However, the non-branded retailers receiving competitive discounts were not distinguishable from the non-branded retailers who were not receiving such discounts on May 15, 1973, in terms of location, type of purchaser, volumes of product purchased, terms and conditions of sale (other than the "competitive" discount in question), or any other objective standard which would serve to differentiate the buyers which received discounts from those which did not, nor is there any cost-justification basis upon

which a Robinson-Patman Act suit challenging the continuance of the price differentials resulting from such discounts could be defended.

The difference in price between those non-branded retailers that purchased from Firm H with competitive discounts and those which did not is not a "customary price differential" which must be preserved by establishing separate classes of purchaser. Although such discounts would have been treated as "customary" under Ruling 1974-18, they need not be maintained pursuant to this ruling because, in construing the intent of FEA regulations to be consistent with the policies of the Robinson-Patman Act, there is not now any objective justification for affording one competitor a price advantage over another. This ruling therefore supersedes Ruling 1974-18 in this respect. The competitive discounts in this example, although not requiring a separate class of purchaser to be established, must nevertheless be taken into account in determining the weighted average selling price to the class of purchaser concerned on May 15, 1973.

.01 40 F.R. 10655 (March 7, 1974).